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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TYREE MAURICE MITCHELL, Defendant and Appellant.	G041189 (Super. Ct. No. FVA020066) O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County, Raymond L. Haight III, Judge. Affirmed.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ronald Jakob and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

We find no merit to defendant's contention the trial court erred when it denied his motion for new trial, permitted the admission of gang evidence and enhanced his punishment pursuant to Penal Code section 186.22, subdivision (b)(1). (Unless otherwise indicated, all further statutory references are to the Penal Code.) At defendant's request in his appellate brief, we have independently reviewed the record of the March 7, 2007 in camera hearing conducted in the trial court under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, and conclude it contains no information sought in defendant's pretrial motion. Defendant's request that we remand his case to the trial court for the purpose of postconviction discovery is denied. We affirm.

I

FACTS

Verdicts, Findings and Sentence

A jury found defendant Tyree Mitchell guilty of one count of first degree murder, two counts of attempted murder, one count of shooting at an occupied vehicle and one count of possession of a firearm by a felon. The jury found to be true that all five crimes were committed for the benefit of a criminal street gang, that defendant personally used and discharged a firearm within the meaning of section 12022.53, subdivisions (b), (c) and (d) in committing both the murder and one attempted murder, personally used a firearm within the meaning of section 12022.53, subdivision (b) in committing the other attempted murder, and acted willfully, deliberately and with premeditation in committing both attempted murders. The court sentenced defendant to state prison for a total indeterminate sentence of 160 years to life.

Trial Testimony

Sometime prior to June 2003, defendant told an acquaintance, Latecca Junius (Junius), he was a member of a Blood gang called the West Covina Mob. Junius's

brother, Anthony Junius, was a member of another Blood gang, Squigley Lanes. The color red is associated with Blood gangs.

Defendant and Anthony Junius had previously been in the same prison at the same time. Both told Junius they "got into a fight" with each other while in prison.

On June 27, 2003, Junius and her fiancée, Damone Shaddock, went to defendant's house to look at some clothes defendant's brother had for sale. Later that evening, Anthony Junius asked Junius to give him a ride to pick up defendant.

When Junius, Anthony Junius and Shaddock picked up defendant, he was wearing a "reddish" shirt. Defendant directed Junius to drive to some apartments in Fontana so he could "go holler at some homies." At the apartments, defendant got out and walked along a walkway into the complex. The car remained in a carport.

Defendant returned to the car five to seven minutes later wearing blue clothes and black leather gloves. Anthony Junius was standing along side the car. Junius said the windows of the car were tinted, and that "the front windows were slightly lighter than the back windows" so she could see defendant talking to her brother. At that point, she heard gunshots. Junius saw the back window of the car shattered. She said: "After that, the defendant takes a step or two and points the gun in Damone's direction, and he — he shoots." She said she saw defendant shoot Shaddock. Junius then saw defendant "point[] the gun in [Junius's] direction and pull[] the trigger, and nothing comes out." Defendant yelled out an obscenity and "took off."

Junius saw blood coming from Shaddock. Shaddock said, "Anthony ran. Drive off." She did. She lost reception on her phone and ended up at a gas station where she saw a police car. She next saw her brother at the police station.

Fontana Police Officer Carlo Granillo was at a Mobil gas station at 3:09 a.m. on June 28, 2003 when "Junius came up frantic and was trying to get my attention, was banging on the glass window." Shaddock had a faint pulse and was breathing.

When he was being moved from the car, a bullet casing fell from his clothing. Granillo described the vehicle: "The rear right-corner panel of the vehicle appeared to have sustained several bullet holes and some graze marks from apparently being shot at. There's also some blood on the rear right-corner panel. In addition to the front driver's side, the right side near the window doorframe of the passenger door had also had some bullet strikes, and apparently the window had been shot at as well with the glass fragments."

Field evidence technician Cynthia Altheide processed the crime scene as a patrol officer. She photographed Anthony Junius. He had a number of wounds. Shaddock died from internal injuries resulting from gunshot wounds to his chest and abdomen.

Anthony Junius testified he and defendant were in the same module at Chino State Prison. The two had a misunderstanding which came to physical blows in the summer of 2002. When he was asked to explain what the fight was about, he said: "He was telling people that he was with my sister and stuff like that." He added: "And other little things like his — like his brother had slept with my girlfriend or something like that." Anthony Junius won the fight.

When asked whether or not he claimed a gang in June 2003, Anthony Junius responded: "I was from a gang, but I wasn't active." He said it is a Blood gang called the Squigley Lanes. With regard to the shooting incident, he said he had been shot four times.

Anthony Junius denied knowing whether or not defendant was a member of a gang. He denied that defendant was his enemy, amplifying, "He's all right with me." He denied defendant shot him, explaining a group wearing blue bandanas walked by, and that one "walked past me, and he had a bandana over his face. So he was trying to see who it was, and as soon as he passed me, he turned around and opened fire."

Immediately after the witness made all these denials, the prosecutor asked him whether or not he was in custody and whether or not a gang member who testifies against another gang member is considered to be a rat or a snitch. Anthony Junius answered in the affirmative to both questions.

Robert Ratcliffe was a detective assigned to robbery homicide for the Fontana Police Department on June 28, 2003. He was the primary investigating officer. At the police station, Anthony Junius was not informed he was being videotaped. He identified defendant as the person who shot him. Shortly after that, Anthony Junius was "not sure or a hundred percent sure" about the identification. A little later, while he was alone with his sister, "he then goes back to talking about what he wants to do to the defendant, Tyree Mitchell, for shooting him."

Over the course of 24 years, Ratcliffe participated in many gang investigations. For a five-year period he was "charged with gang intelligence, gang prosecutions and identifying gang members" when he served as a gang detective.

Based on his experience investigating gangs, Ratcliffe knew Anthony Junius to be a gang member. He explained why he thought Anthony Junius went "back and forth between being sure it was the defendant and saying he was not so sure" by stating: "Well, based on what I've seen in the past and my experience in dealing with gang members I think the proverbial light bulb came on with him. He started to understand, yeah, I want to tell what happened, then, wait a minute, you know, there's a certain code with gang members. And if I become a snitch or I start talking about somebody that did something to me, that's bad . . . ."

Ratcliffe was asked whether or not he was familiar with the use of trajectory rods. He said: "[T]hey are wooden dowel sticks that are used to recreate a bullet path in any inanimate object." He explained why he did not direct anyone to use trajectory rods in the investigation here: "They're used for very specific things a lot of

times. And when I say specific, if we're not certain as to where someone may have been standing, when the weapon was fired or what positioning different bodies or different people may have been standing or sitting or laying, then we may use a trajectory rod to try to determine exactly the path that a bullet would have come from. Say you had two people in front of the victim, you know, with the trajectory rod you might be able to tell which one of those two fired on a person. So that would be a specific use item." He added that "[t]here's no way to exactly replace the Neon into the spot it was at when this occurred. She said she was parked there. We found the bullet casings and the other evidence there, so there was no reason to try to recreate the trajectory of bullets based on the fact that we could not recreate the scene itself exactly as it was." Under cross-examination, he said that "[b]ased on the size of the parking space and the location of the spent casings it wouldn't have helped us . . ." to use trajectory rods.

Because defendant disappeared, the police were unable to arrest him right away. He was taken into custody on a warrant in February 2004. While defendant was in jail on February 19, 2004, a San Bernardino County sheriff had to pepper spray and separate defendant and Anthony Junius who were fighting with each other.

Gang Expert

Aaron Vigil is a detective with the Rialto Police Department's Street Crime Attack Team, known as the SCAT unit. He had previously testified approximately 40 times as a gang expert.

Vigil said that Crip gangs all have a common enemy, Bloods. He described an investigation "where a Crip wore red or a Blood wore blue to commit a crime." In such a crime, where a gang member "switches to a rival gang's colors," the tactic is used "so they don't get caught and go to jail," and credit is received by word of mouth. Vigil

added: "So it's one of the main reasons they do change colors is to throw witnesses off, to throw victims off, to throw the police off, so . . ."

The primary activities of the West Covina Mob gang are "robberies, assault with deadly weapons, shootings, carrying weapons." Vigil detailed the importance of respect within gangs, and said a Blood gang member kills another Blood gang member as well as a rival if he has been disrespected.

Vigil described the tattoos on defendant, stating they are gang tattoos. He said one tattoo on defendant's chest represents vengeance and its significance is that "it goes with the other tattoos in the whole gang situation. You know, these guys are letting you know that, you know, if you cross me that this is, you know, you're going to get vengeance."

Vigil was given a hypothetical set of facts: "Summer of 2002, there's a fight between two Blood gang members in front of other inmates in prison. [¶] . . . [¶] One Blood gang member wins the fight, beats up the other Blood gang member. [¶] . . . [¶] The Blood gang member who won the fight does not get out of prison until the following spring, say at the end of May of 2003. [¶] . . . [¶] That Blood gang member has been in prison the whole time. [¶] . . . [¶] On the day in question in this hypothetical the Blood gang member, who won the fight, shows up at the house of the other Blood gang member who he beat up. [¶] . . . [¶] That Blood gang member acts very friendly to the Blood gang member who beat him up in prison, acts like everything's been squashed, there are no hard feelings and offers a plan to make money that night out in a different location. [¶] . . . [¶] Committing a crime spree say. [¶] . . . [¶] Blood gang member who won the fight thinks everything is fine, goes along with it, and the Blood gang member who lost the fight takes that Blood gang member far away from the location that they're familiar with, puts him in a location they're not familiar with, and at that time the Blood gang member, who lost the fight, leaves for a few minutes. He's gone for a few minutes,

says I'm going to talk to some homies. I'll be right back. And several minutes or some minutes later that Blood gang member, who got beat up, comes out dressed in blue, a blue shirt, blue and gray weave cap and begins firing a gun at the Blood gang member who beat him up. [¶] . . . [¶] After shooting that Blood gang member, who beat him up, he then turns the gun on two other individuals who were also present at the scene at the time. [¶] . . . [¶] One of whom had never met him before that night, the other of whom he knew over the years, social settings. [¶] . . . [¶] After shooting the victims the Blood gang member runs off."

The prosecutor asked Vigil whether or not he had an opinion, based on the hypothetical facts, the shootings "would enhance the reputation of that Blood gang member in his gang?" Vigil said his reputation would be enhanced, explaining: "Well, basically it goes back to the — to the gang. He's been disrespected in prison. He has to gain that respect back. Not only that, but when the guy comes to his house, it's kind of a slap in the face, saying, hey, you know what? I beat you up, yeah, I beat you up, and I can come to your house because of it." Vigil went on to say the shooter's reputation would be enhanced by word of mouth that there was payback.

Stipulation

The parties reached the following stipulation which was read to the jury: "Number one, the defendant, Tyree Mitchell, was a West Covina Mob Blood gang member on June 28, 2003. [¶] Number two, the defendant, Tyree Mitchell, has a qualifying predicate conviction pursuant to California Penal Code section 186.22(b). [¶] Number three, Rene Dendaas was a West Covina Mob Blood gang member on February 21, 2003, when he sustained a qualifying predicate conviction pursuant to California Penal Code section 186.22(b). [¶] Number four, both defendant, Tyree Mitchell's qualifying predicate conviction and Rene Dendaas' predicate conviction

sufficiently established the pattern of criminal gang activity for the West Covina Mob Blood gang."

II

DISCUSSION

Motion for New Trial

Defendant argues he was denied his constitutional rights when the prosecution willfully failed to preserve critical physical evidence. The car was released to the owner on July 19, 2003, about three weeks after the shootings. Later it was "totaled," and "went to salvage" in May 2004. Trial started on January 15, 2008.

During pretrial proceedings, when defendant was in propria persona with advisory counsel, on April 14, 2006, he told the court: "I would like to withdraw all of my motions except for the discovery compliance and the confidential informant motion." The prosecutor asked: "Okay. Does that mean that the Trombetta/Youngblood one has been withdrawn?" The court asked defendant: "You're withdrawing all those, aren't you?" Defendant responded: "Yes."

Several days before the trial commenced, on January 2, 2008, counsel for defendant informed the court the defense wanted a "Trombetta motion" heard. The court set a briefing schedule, giving the defense until January 7 to file its points and authorities. We see no indication in the record cited that defendant ever filed his brief.

After trial, defendant moved for a new trial "on the ground that the defendant was denied his right to due process by the prosecution's subsequent loss of the vehicle. (a green 1998 Plymouth Neon, four door, owned by victim/witness Latecca [Junius].) Such evidence was vital to the defendant because it possessed a material and exculpatory value and it may have exonerated the defendant." (Capitalization omitted.) In its written opposition, the people pointed out that, even though the vehicle had tinted windows, the witness sitting inside it testified she could nevertheless see defendant

speaking with her brother and shooting Shaddock. The opposition also stated defendant shot out a portion of the tinted window, through which she was also able to observe defendant. The People noted Fontana Police Department personnel took numerous photographs of the vehicle "including a significant number of photographs of the front, back and rear tinted windows" and that both sides introduced several of them during trial.

The court heard argument on the motion for new trial. The prosecutor argued defendant waived his claim by not bringing a pretrial motion and that defendant's due process rights were not violated because the preserved evidence, including photographs and fingerprints, were made available to the defense. The court found there had been no showing the vehicle "had any real exculpatory value" and there was "no evidence of bad faith on the part of the police," and denied the motion.

On review of a trial court's ruling on a motion for new trial, there is a strong presumption it properly exercised that discretion. "'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 524.) Nevertheless, questions of law are decided de novo by the appellate court. (*People v. Hinks* (1997) 58 Cal.App.4th 1157, 1160.)

Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488.) To fall within the scope of this duty, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Id.* at p. 489.) The state's responsibility is further limited when the defendant's challenge is to "the failure of the State to preserve evidentiary

material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57.) "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Id.* at p. 58.)

In *People v. DePriest* (2007) 42 Cal.4th 1, the defendant also contended his rights were violated when the police released the victim's car before he had it examined. (*Id.* at p. 40.) The California Supreme Court did not find the police acted in bad faith, and noted: "The record discloses that the prosecution scoured Nguyen's car for trace evidence, and provided the results of that examination to the defense. Defendant has not argued at trial or on appeal that the prosecution failed to conduct necessary tests or performed any testing in a deficient manner. Rather, he claims only that the prosecution should have preserved the car from which forensic test results were obtained. Even assuming negligence on the prosecution's part, no more can be said than that the car could have been subjected to further testing by the defense. Accordingly, no due process violation occurred . . . ." (*Id.* at p. 42.)

In his brief, defendant argues the car's exculpatory value was "apparent" in that the police sealed, towed and scoured it for forensic evidence. He claims the eyewitness testimony of Junius "was the linchpin of the prosecution's case" since, at trial, her brother denied defendant was the shooter. He argues that "within a day or two after the shootings, it was known that the entire prosecution case would rest on Ms. Junius's identification." He says one way to discredit her testimony "would be to prove to the jury that, based on lighting in the area, especially from inside the Neon, she could not have seen what she claimed to see," and that the police "should have realized the defense" might want to view the car in the carport and "conduct certain tests on the bullet holes in the car."

There are several matters defendant does not address in his argument. Even though it was so obvious to him that the police should have realized the car was an important piece of evidence, he cites to nothing in the record to demonstrate he attempted to examine the vehicle between the time he was eventually arrested in February 2004 and the time the car was sent to salvage in May 2004. And he does not explain why the evidence accumulated by the police, and turned over to him, was insufficient.

Defendant emphasizes the "darkly tinted windows," but does not provide an explanation why it was only the darker tinted windows which were so important when the front window, next to where Shaddock was sitting when he was shot, was tinted a lighter shade than the back windows. Nor does he explain why the tint of the windows was so vital when Junius testified the back window, where Anthony Junius and defendant were standing was shattered when Anthony Junius was shot, before defendant took a few steps and shot Shaddock.

In his reply brief, defendant states "the level of the window tint in the car cannot be recreated," but provides no cite to the record to support such an assertion. He does not even contend other evidence could not have been presented to show the jury the color of the back window before it was shattered.

Also lacking explanation or argument is what testing with trajectory rods, could have revealed when the car had been moved after the shootings. Ratcliffe testified extensively about how fruitless such testing would be in this situation where the general position of the players was known and where the vehicle had already been moved from the parking place, making an exact recreation of the scene impossible.

Under the circumstances of this record, we do not determine the trial court erred when it ruled the car had no material exculpatory value that was apparent before the evidence was destroyed. Nor do we find error in the court's finding of no bad faith on

the part of the police. Accordingly, we conclude the court did not abuse its discretion when it denied defendant's motion for new trial.

Admission of Gang Evidence

Defendant contends his rights were violated when the trial court permitted the gang expert to testify "to the ultimate issue in the gang allegation attached to all counts." He argues the prosecution's expert was presented with a hypothetical question "over appellant's objection" and "opined that someone in appellant's position, if beaten in front of other people in prison, would feel 'disrespected,' and would shoot the person who beat him in order to regain his respect, and would also shoot any eyewitnesses to that crime."

Based upon the one objection which appears on the pages in the record cited by defendant in his brief, the questions asked by the prosecutor and the expert's answers to which defendant is apparently referring are: [¶] Q: "Hypothetically, detective, if a gang member got beat up in prison by a number — or in front of a number of other inmates, what would that do to a gang member's reputation?" [¶] A: "Well, it would – he would be disrespected, definitely." [¶] Q: "Okay. And how would that [a]ffect the reputation of the gang member?" [¶] A: "Well, he would definitely have to — it would drop his respect within the gang. His reputation would go down. You know, the other gang members a lot of times make fun of him, so his reputation would drop significantly." [¶] Q: "Now, would this — the result of this — this beating, would that be something that was strictly personal between the gang member who got beat up, or would that be something that would be gang business?" [¶] Defense counsel: "I'm going to object at this point. Lacks foundation, calls for speculation as phrased." [¶] The court: "I think it's within the purview. Overruled. You can answer." [¶] A: "Both; it would be both."

Thus, the only question to which there was an objection was: "Now, would this — the result of this — this beating, would that be something that was strictly personal between the gang member who got beat up, or would that be something that would be gang business?" Evidence admitted without objection cannot be challenged for the first time on appeal. (*People v. Gallegos* (1971) 4 Cal.3d 242, 249.)

A trial court's decision to permit the admission of gang evidence is reviewed for abuse of discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) "Although evidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged — and thus should be carefully scrutinized by trial courts — such evidence is admissible when relevant to prove identity or motive, if its probative value is not substantially outweighed by its prejudicial effect. [Citation.]" (*Ibid.*)

In *People v. Killebrew* (2002) 103 Cal.App.4th 644, the court found error in admitting expert testimony that went to the ultimate issue in the case because it was "the type of opinion that did nothing more than inform the jury how [the expert] believed the case should be decided." (*Id.* at p. 658.) "A bright line cannot be drawn to determine when opinions that encompass the ultimate fact in the case are or are not admissible." (*Id.* at p. 651.)

Here both the identity of the shooter and a gang motive or gang connection were issues. Defendant changed his clothes to avoid being recognized. The expert's testimony was necessary to explain the significance of defendant's switching from red clothes to blue clothes. It was also relevant to explain why a witness who is a gang member might be reluctant to identify another gang member as the shooter.

With regard to defendant's gang motive to shoot defendant, as well as witnesses Shaddock and Junius, the gang expert was able to explain why a gang member would want to eliminate witnesses: ". . . this is how a gang member gets his respect back.

He shoots the subject and the other two people are obviously witnesses, which he doesn't need, so he would have to attempt to kill them also."

Under the circumstances in the record before us, we cannot say the trial court abused its discretion when it permitted gang expert testimony. Even if there was error, however, it is not reasonably probable that a result more favorable to defendant would have occurred absent the error as the evidence against defendant is overwhelming. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Gang Enhancements

Defendant argues he was denied his rights to due process and a fair trial because his sentence was enhanced without sufficient evidence he intended to benefit a criminal street gang. The Attorney General contends "viewing the evidence in the light most favorable to the verdict, the findings must stand."

"[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted . . ." shall have his sentence enhanced. (§ 186.22, subd. (b)(1).)

"The law regarding appellate review of claims challenging the sufficiency of the evidence in the context of gang enchancements is the same as that governing review of sufficiency claims generally." (*People v. Leon* (2008) 161 Cal.App.4th 149, 161.) In addressing challenges to the sufficiency of evidence, "the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a

reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]"' [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

"[A] 'specific intent to *benefit* the gang is not required.' [Citation.]" (*People v. Leon, supra,* 161 Cal.App.4th at p. 163, fn. omitted.) "The crucial element, however, requires that the crime be committed (1) for the benefit of, (2) at the direction of, *or* (3) in *association* with a gang. Thus, the typical close case is one in which one gang member, acting alone, commits a crime." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) An expert may properly testify whether a crime was committed to benefit or promote a gang. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512.)

People v. Albarran (2007) 149 Cal.App.4th 214, is inapposite. In that case, there was a shooting at a birthday party, and the gang expert heard there had been gang members in attendance. There was nothing in the facts of the case to suggest gang involvement, gang association or gang motive. (*Id.* at p. 227.)

Here defendant stipulated he is a member of a Blood sect. He wore Blood colors until immediately prior to the shootings, whereupon he changed into a rival gang's colors. He bore gang tattoos, one of which reads "vengeance" which, according to the

gang expert, signifies that "these guys are letting you know that, you know, if you cross me that this is, you know, you're going to get vengeance." Defendant and Anthony Junius had previously had a fistfight in prison, which defendant lost. The gang expert said this meant defendant had been disrespected, and "[h]e has to gain that respect back."

The gang expert was given a hypothetical question containing the same details as the instant crimes. He was asked whether the crimes in the hypothetical would enhance the reputation of the hypothetical Blood gang member within his gang. The expert said the shootings were the way for the hypothetical gang member to regain his respect within the gang. A gang expects a member who has been disrespected to "get payback," and the gang benefits "by other people on the street . . . . If people know that these gangs are committing murders, witnesses, you know, average citizens, they don't want to come forward, either like we talked before, the intimidation part. It's how these guys operate. [¶] . . . They're able to go out and do the crime at will, and nobody testifies against them. Nobody wants to come forward and point them out." The expert added that rival gangs will know that "these guys will kill you, you know, be careful. So their status within the — within the gang community also raises up."

Under the circumstances in the record before us, we conclude there was sufficient evidence to satisfy the requirements for enhancing defendant's punishment under section 186.22, subdivision (b)(1). The court did not err.

Motion

On November 3, 2008, defendant filed a motion requesting "a reporter's transcript of a *Pitchess* hearing filed under seal in this Court be unsealed and released to his appellate counsel, so counsel may review it and determine whether it supports possible appellate issues; or else that this transcript be examined by this Court for error . . . ."

In his motion on appeal, defendant states he pursued a motion under *Pitchess v. Superior Court, supra*, 11 Cal.3d 531 at trial. In *Pitchess*, the Sheriff of Los Angeles County sought a writ of mandate to prevent a criminal defendant from discovering evidence of the complaining witnesses' propensity for violence. (*Id.* at p. 534.) The Supreme Court discussed the fundamental right of a criminal defendant to a fair trial, which included the right to access information that might be relevant to a potential defense, and the absence of statutory guidelines for discovery in criminal cases. (*Id.* at pp. 535-536.) The high court concluded that trial courts have wide discretion in allowing peace officer personnel files to be discovered after a "defendant demonstrate[s] sufficient good cause under the appropriate standards of criminal procedure, as developed in case authority, to warrant the trial court in compelling discovery." (*Id.* at p. 538.)

Defendant further states in his motion on appeal that in the trial court, he sought "to discover from the files of his arresting and interrogating officers (1) their training on retaining exculpatory evidence, and (2) whether other civilian complaints had been made against them for intentionally or negligently destroying, or for intentionally or negligently failing to preserve, evidence with possible exculpatory value."

In the trial court, two years before trial commenced, defendant requested materials relating to Detectives Ratcliffe and Snyder. On February 5, 2007, defense counsel filed another motion for police officer personnel records. In that motion, counsel stated in his declaration that defendant requested records involving Officer Ray Schneiders, one of the investigating officers in this case. On February 28, 2007, defense counsel filed a supplemental declaration which stated: "Defendant contends that this officer has a propensity for dishonesty and that review of this officer's personnel records will demonstrate this. [¶] Defendant withdraws any additional allegations of wrongdoing by this officer at this time."

On March 7, 2007, the trial court conducted an in camera hearing. Also present were the city attorney for the City of Fontana, the custodian of records, the court clerk and the court reporter. The custodian of records was sworn and examined. At the conclusion of the hearing, in open court, the court stated: "I did not find there's any matters that are discoverable."

The Court of Appeal, Fourth District, Division Two, denied defendant's motion without prejudice to including a request for independent review in his opening brief. In his opening brief, defendant states: "Based on Division Two's November 6, 2008 order, however, appellant further suggests that, in deciding the issues presented by this Section of this Opening Brief, this Court independently review the in-*camera* record of the *Pitchess* hearing, to determine whether anything in it supports a claim of police bad faith in releasing the Neon, in violation of departmental policy and/or before the defense independently could test it."

We have independently reviewed the record of the March 7, 2007 in camera hearing. We conclude the record contains no information sought in defendant's pretrial motion.

Postconviction Discovery

Defendant next argues the trial court erred when it denied his request for postconviction discovery of the Fontana Police Department's policy regarding stored evidence. In his motion, he argued he should be allowed to see the police department's manual for preserving evidence for purposes of impeaching the police officers. After hearing argument on the motion, the trial court denied it.

On appeal, he says he "diligently sought" such evidence. He requests this court "conditionally reverse the [judgment] and remand this matter to the trial court, with directions that it grant that discovery motion, order the People to produce the procedures

manual, allow appellant to refile his New Trial motion with the additional information, and order a new hearing on the New Trial motion." For this proposition, he cites *People v. Moore* (2006) 39 Cal.4th 168.

In *People v. Moore, supra,* 39 Cal.4th 168, the trial court made its ruling regarding a motion to suppress before the Supreme Court issued an opinion bearing upon the same issue. The court explained: "In 2003, we held that police officers must know of a defendant's parole search condition to justify a warrantless search under that exception. (*People v. Sanders* (2003) 31 Cal.4th 318, 335, (*Sanders*).) In this case, because the hearing on the defendant's suppression motion (Pen. Code, § 1538.5) occurred before we decided *Sanders,* the trial court concluded that the search was valid based only on evidence that defendant was subject to a parole search condition. [Citations.] The parties did not present evidence whether the officers knew of defendant's search condition at the time of the search." (*Id.* at p. 171, fn. omitted.) Because of the unusual set of circumstances, the court did remand that matter for further proceedings: "In the event of remand, both parties agree that a full hearing on the motion to suppress, rather than a limited hearing on whether the officers were aware of the parole search condition at the time of the warrantless search, is required. Because the parties focused solely on the existence of defendant's parole search condition, which the trial court relied on to justify the warrantless search and to deny defendant's motion, we conclude that a new suppression hearing to decide any alternate grounds contained in the original suppression motion and the opposition thereto is proper." (*Id.* at p. 178.)

No such similar circumstances exist here. In his brief, defendant says he filed a motion on January 23, 2006 seeking "the departmental policy manual on how to handle the retention of evidence, including cars . . . ."

There is a subpoena duces tecum to the Fontana Police Department dated March 23, 2006, in which he sought the same documents. During the court hearing, the

prosecutor objected that "the subpoena is not the proper procedure for him to acquire these documents." The court told defendant: "You do have to go through the district attorney, not subpoena it directly from Fontana Police Department. So this is the easy one I suppose." The court quashed the subpoena.

On April 11, 2006, defendant filed a pretrial discovery motion. In it, he requested the same documents regarding preservation of evidence by the Fontana Police Department.

In his appellate brief, defendant says the court never ruled on the motion he filed on April 11, 2006. Nor do we see any indication in the record citations in defendant's brief that the court ever held a hearing on the motion. As noted above, the trial finally got underway on January 15, 2008.

"'When a party by his conduct induces the commission of an error, he is estopped from asserting it as a ground for reversal. [Citation.]' [Citation.]" (*R & B Auto v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 350.) """An appellate court will ordinarily not consider procedural defects . . . where an objection could have been but was not presented to the lower court by some appropriate method . . . . Often, however, the explanation is simply that it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial."""" (*People v. Alistar Ins. Co.* (2003) 115 Cal.App.4th 122, 126, fn. omitted [bail bond forfeiture].) "[W]here a court, through inadvertence or neglect, neither rules nor reserves its ruling, the party who objected or made the motion must make an effort to have the court actually rule, and that when the point is not pressed and is forgotten the party will be deemed to have waived or abandoned the point and may not raise the issue on appeal. [Citations.]" (*People v. Brewer* (2000) 81 Cal.App.4th 442, 461-462.)

Here defendant does not explain why, in the 21-month period between the time he filed his motion and the start of trial, he did not ask the court to conduct a hearing

or rule on his motion. Under these circumstances, if there was error on the part of the court, defendant invited it.

Cumulative Errors

Finally, defendant claims that the cumulative effect of the asserted errors warrants reversal, citing *People v. Hill* (1998) 17 Cal.4th 800. As noted in that case, "defendants are entitled to 'fair trials' but not 'perfect ones.'" (*Id.* at p. 844.) He received a fair trial. If the trial court did err, such error was either harmless or invited.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.